IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 3721 OF 1994

Dr. JAYANTILAL KHIMJI RATHOD)
R/o Amrut Society, Old Adgaon)
Naka, Panchavati, Nasik) .. PETITIONER

Versus

NARBHERAM SHIVAJI CHAVAN)
R/o Old Adgaon Naka, Panchavati
Nasik) .. RESPONDENT

Mr. R.A. Thorat for petitioner

Mr. R. D. Sony i/b Ram & Co. for respondent

CORAM:-SMT.RANJANA DESAI, J.

DATED:-19/8/2005

ORAL JUDGMENT:

. The petitioner is the original-defendant in Regular Civil Suit No. 807 of 1982 filed in the court of Second Joint Civil Judge, Junior Division, Nasik. The suit was filed by the respondent-landlord for possession on the ground of non-payment of arrears of rent and on the ground of non user of suit premises without reasonable cause for the purpose for which they were let for a

continuous period of six months immediately preceding the date of filing of suit i.e. under Section 13 (1)(k) of the Bombay Rents, Hotel & Lodging House Rates (Control) Act, 1947 ("the Rent Act" for short). The trial court held that the plaintiff had failed to prove that the defendant was in arrears of rent. The trial court however, decreed the suit under Section 13 (1) (k) of the Rent Act. The defendant carried an appeal in the District Court at Nasik being Civil Appeal No. 74 of 1989. The lower appellate court by its judgment and order dated 19/7/94 confirmed the trial court's judgment. Being aggrieved by the said judgment and order the defendant has filed this writ petition.

2. Since both the courts have negatived the plaintiff's case that the defendant was liable to be evicted on the ground of arrears of rent, this court is now concerned only with the question whether the plaintiff has made out a case under Section 13(1)(k) of the Rent Act.

3. Shortly stated the plaintiff's case is that the plaintiff has let out the suit premises to the defendant for conducting a dispensary. However, for a period of more than six months immediately

preceding the suit the defendant is not using the suit premises for the purpose for which they were let out to him. He has kept the suit premises locked without any reasonable cause and hence he is liable to be evicted under Section 13(1)(k) of the Rent Act. The plaintiff also contended that the defendant is a government servant and while in government service the defendant cannot run a private dispensary. He cannot engage himself in a private business. The defendant is using the suit premises as a private dispensary illegally. In support of his case, the plaintiff examined himself and one Sudhakar Sali.

4. The defendant denied the plaintiff's case that he has kept the suit premises locked for more than six months. According to him he is using the suit premises for running his dispensary and hence no case is made out under Section 13(1)(k) of the Rent Act. He also contended that he is in government service and therefore, at times he is unable to remain present at Nasik. On those occasions he cannot run the dispensary. However, such occasions were few.

5. The defendant's further case is that he is in

government service since the year 1968, and on 1/2/78 he has taken the suit premises on rent. It is his case that the fact that he was in government service was known to the plaintiff. In support of his case the defendant examined himself and examained one Dilipbhai Rathod.

6. I have heard the learned counsel appearing for both sides at great length.

7. Mr. Thorat, learned counsel for the petitioner-defendant contended that under Section 13(1)(k) of the Rent Act the initial burden is on the landlord to prove that the tenant has not used the suit premsies for a continuous period of six months immediately preceding the date of the suit without reasonable cause for the purpose for which they were let out. In the instant case according to Mr. Thorat the landlord has not discharged this burden. The burden never shifted to the tenant. He contenderd that both the courts have wrongly placed the initial burden on the tenant.

8. The learned counsel further contended that Section 13(1)(k) contemplates complete closure. He submitted that in the instant case there is a clear

indication in the evidence that there was no complete closure of the dispensary and, therefore, Section 13(1)(k) is not attracted.

9. Mr. Thorat further submitted that in the plaint the plaintiff has not specified the period during which according to him the suit premises were not used without reasonable cause for the purpose for which they were let. He submitted that that is an essential requirement of Section 13(1)(k) and in asmuch as there are no specific pleadings the suit must fail on that ground.

10. Mr. Thorat also drew my attention to paragraph 5 of the plaint and contended that in this paragraph the plaintiff has made a categorical statement that the defendant is conducting the dispensary. He submitted that this paragraph non suits the plaintiff.

11. Mr. Thorat contended that admittedly the defendant is in government service since 1968. The premises were let out to him on 1/2/78. The default of rent which was alledged was from 1/12/81. However, both the courts have held against the plaintiff on the ground of default.

This finding of the courts below militates against the plaintiff's case of non-user.

12. Mr. Thorat then urged that the plaintiff has not produced any documentary evidence as regards non user of the suit premises. He could have examined any adjoining shop owner in support of his contention that the suit premises were closed. However, no such evidence is adduced and, therefore, the view taken by both the courts that the plaintiff has made out a case under Section 13(1)(k) is perverse and deserves to be upset.

13. Mr. Thorat relied on several judgments in support of his above submissions. He placed reliance on Kasturchand Panachand Doshi & Ors. v. Yeshwant Vinayak Sainkar & Anr., AIR 1980 BOMBAY 270. In that case the landlord had filed a suit for eviction on the ground of Section 13 (1) (a) of the Rent Act read with Section 108 (o) of the Transfer of Property Act as well as Section 13 (1) (k) of the Rent Act. It was urged that the total non user of the premsies for the purpose for which they were let out is one of the three essential conditions to attract the provisions of Section 13 (1)(k) of the Rent Act. The learned Single Judge

of this court observed that there is considerable substance in this submission. Mr. Thorat contended that the observations made by this court in Kasturchand's case would be attracted to this case. He submitted that unless there is complete closure Section 13(1)(k) would not be attracted.

14. Mr. Thorat then placed reliance on Shri Cyrus Behram Irani & Anr. v. Shri Parvis Burjorji Engineer (since deceased by his heirs) (1) Dinoo Parviz Engineer & Anr., 1991 Mah. R.C.J. 158. In that case the landlord sought to evict the tenant under Section 13(1)(k) of the Rent Act. This court held that Section 13(1)(k) of the Rent Act gives cause of action to the landlord for evicting the tenant when there is continuous non user of the premises without any reasonable cause for a period of six months immediately preceding the date of the suit. It was further observed that it is not enough to show that the defendant has only put a lock to the suit premises and he does not require the suit premises any more. This court referred to the plaint and noted that in the plaint the words "without reasonable cause" were wholly absent. It was held that in the circumstances it was not a case which warranted interference under Article 227

of the Constitution of India.

15. Mr. Thorat then referred to C. R. Shaikh v. Lilabai D. Rhoida & Anr., 1981 Mh. L.J. 437. In that case this court was dealing with eviction suit under section 13(1)(k) of the Rent Act. This court observed that Section 13(1)(k) emphasises a continuous period of six months immediately preceding the date of the suit. It was observed that both parts of the Section namely the continuous non user upto the date of the suit and the absence of reasons for such non user are material and important. It was observed that even if the tenant has not used the premises for a period of six months some time before the filing of a suit or for more period that would not give the landlord a cause of action. That state of affair must continue till the date of the filing of the suit. It was further observed that if a tenant who has not used the premises for a long period but had started using them before the date of the suit, the cause of action is gone. This court further observed that the words "continuous" and "immediately preceding the date of the suit" occuring in clause (k) of sub-section (1) of Section 13 only bring out clearly that the cause of

action claimed is on that account.

16. Mr. Thorat contended that in this case the plaintiff has not been able to make out a case of non-user for a continuous period of six months immediately preceding the date of the suit. Even the pleadings are faulty and hence Section 13(1)(k) is not attracted.

17. Mr. Thorat then referred to Babhutmal Raichand Oswal v. Laxmibai Raghunath Tarte, 1972 Mh. L.J. 382 where while dealing with a case under Section 13(1)(k) of the Rent Act, this court has held that the landlord must establish that premises were not used for the purpose for which they were let. The initial burden is on the landlord. Similar view was reiterated by this court in Laxmibai Ramji v. Khimji Palan, AIR 2001 BOMBAY 3.

18. Mr. Thorat also referred to Achut v. Sadashiv, 1973 Mh.L.J. 153 to contend that if the evidence indicates that there is intention on the part of the tenant to return to the suit premises then it cannot be said that he has no reasonable cause for not using the premises. Mr. Thorat

contended that in this case the defendant had paid the rent. His furniture is in the suit premises. There is evidence to indicate that he had intention to use the suit premises and, therefore, it cannot be said that he had no reasonable cause for not using the premises.

19. Lastly Mr. Thorat relied on judgment of the Gujarat High Court in Shah Motilal v. Kansara Becharlal, 191 B R C 1987, where the Gujarat High Court has held that the onus to prove non-unser is on the plaintiff and the plaintiff cannot succeed on the weakness of the defendant.

20. Mr. Thorat submitted that the trial court did not frame any issue as to whether the premises were used for a continuous period of six months without reasonable cause or not. He submitted that in fact the lower appellate court has gone to the extent of observing that it is not necessary to consider whether there was reasonable and just cause for not using the premises. He submitted that, therefore, there is no adjudication of a very important ingredient of Section 13(1)(k). Mr. Thorat submitted that if the present case is considered in the light of the above judgments, it must be held

that the impugned judgments are perverse warranting my interference.

21. Mr. Sony, learned counsel appearing for the respondent on the other hand submitted that it is true that initial burden is on the landlord but in the instant case the landlord has discharged it by leading his own evidence and the evidence of one more witness who is conducting the business on the ota of the suit premises. Mr. Sony contended that paragraph 4 of the plaint clearly makes out a case under Section 13(1)(k) of the Rent Act. He submitted that in paragraph 5 the plaintiff has only emphasised that the defendant's conducting the dispensary was even otherwise illegal because he was in government service. He submitted that paragraph 5 will have to be read with paragraph 4 and if it is so read then a case under Section 13(1)(k) is clearly made out.

22. Mr. Sony further contended that after the plaintiff discharged the burden it shifted to the defendant. The defendant has not established by leading evidence that this case falls outside the purview of Section 13(1)(k). He submitted that the defendant has merely denied the plaintiff's case.

He has not made out any case in his pleadings or in his evidence that there was any reasonable cause for non user. His case is that he was using the suit premises. Mr. Sony submitted that, therefore, there was no question of framing any issue in that behalf. In any case, submitted Mr. Sony, the parties have led evidence on all aspects. There is sufficient indication in the judgment of both the courts that even this aspect has been considered. He submitted that in fact the lower appellate court has framed the point about reasonable cause and, therefore, this submission of Mr. Thorat must fail.

23. Mr. Sony further submitted that the defendant has not produced any evidence to substantiate his contention that he was conducting dispensary in the suit premise. He submitted that in his evidence the defendant has stated that he is in possession of certain documents but he has not produced those documents and, therefore, adverse inference needs to be drawn against the defendant. In this connection Mr. Sony placed reliance on a judgment of the learned Single Judge of this court in Chandrakant Babubhai Tanna v. Ratanbai Viraji Thakkar, 2004(1) All M.R. 588 and contended that

no fault could be found with the pleadings in the instant case as the plaintiff has averred that the premises were not used continuously for more than six months for the purpose for which they were let. He submitted that this obviously would mean six months from the date preceding the date of the suit. Relying on Chandrakant Tanna's case Mr. Sony contended that both the courts have concurrently found that the premises have not been used for for the purpose for which they were let continuously for a period of six months preceding the date of suit without reasonable cause. There is no perversity attached to this finding. This court, therefore, should not interfere with the concurrent finding of fact in its writ jurisdiction. In this connection Mr. Sony also relied on Art Wood Shop, Pune & Anr. v. J. B. Pandit & Ors., 1999 (2) Mh. L.J. 482.

24. It is well settled that this court cannot interfere with a concurrent finding of fact in its writ jurisdiction unless it comes to a conclusion that it is perverse. Reliance placed by Mr. Sony on the judgment of this court in Art Wood's case and Chandrakant Tanna's case is apt. Having considered the rival submissions of the parties I

am of the view that it is not possible to characterise the judgments of the courts below as perverse so as to warrant my interference. I will now state the reasons for this conclusion.

25. It is true that under Section 13(1)(k) the initial burden is on the landlord but it is not possible for me to hold that the plaintiff/ landlord has not discharged the said burden. The plaintiff has stated in his evidence that the defendant was not using the suit premsies for his dispensary. Shutters of the suit premises are not even opened by the defendant. The premises are not used for years together and there is no sufficient reason or cause for non-user. The plaintiff has also examined Sudhakar Sali who is a car mechanic. Sudhakar Sali is doing his work on the ota of the suit premises. He has stated that the suit premises used to remain closed.

26. It is significant to note that in his evidence the defendant has admitted that Sudhakar Sali is using the ota to repair motor cycles. Therefore, presence of Sudhakar Sali on the ota of the suit premises cannot be disputed. Both the courts have rightly believed the plaintiff and Sudhakar Sali

and I have no reason to take a contrary view. Therefore, the initial burden is discharged by the plaintiff. It needs to be seen whether the defendant has discharged the burden which shifted to him.

27. Sofar as the defendant is concerned, though he has referred to several documents and stated that they are in his possession and that they substantiate his claim that he is using the suit premises, not a single document is produced by him in the court. In my opinion, therefore, to the facts of this case the judgment of this court in Ravinbhushan Anant Datar & Anr. v. Waman Dattatray Purohit, 2004(1) Mh.L.J. 100, is clearly attracted. Failure to produce any evidence whatsover to show the user of the premises for the purposes for which they were let is fatal to the defendant’s case particularly when he has specifically stated that he is in possession of the said documents.

28. So far as the argument that the plaint does not contain the necessary averments is concerned, I find no substance in it. In the plaint it is specifically averred that the defendant has not

been using the suit premises for the purpose for which they were let for more than six months and, therefore, there is a breach of relevant provisions of the Rent Act.

29. My attention is drawn to the suit notice also where similar averment is made. In his evidence also the plaintiff has contended that for several years the suit premises have been kept closed. This court in Chandrakant Tanna's case was considering a similar fact situation where in the plaint the specific period was not stated. It was only stated that the suit premises were closed for last 20 to 22 months and they were not being used for the purpose for which they were let out. This court found the averment to be sufficient to attract Section 13(1)(k) of the Rent Act. In my opinion, the reliance placed by Mr. Thorat on Cyrus Irani's case is misplaced because in that case the court was considering a situation where in the plaint the words without reasonable cause were wholly absent. Such is not the case here.

30. Similarly the judgment in C. R. Shaikh's case would also not come to the rescue of the defendant. In that judgment this court has taken a

view that the non user must continue till the date of the filing of the suit. There can be no dispute about this proposition. In this case it is the plaintiff's contention that the suit premises are not used for more than six months's period. In my opinion, in the circumstances of the case considering the fact that the suit is filed under Section 13(1)(k) of the Rent Act, the averment made in the plaint must definitely relate to the period immediately preceding the date of filing of the suit. I am also not impressed by Mr. Thorat's submission that averment made in paragraph 5 of the plaint non suits the plaintiff. Paragraphs 4 and 5 will have to be read together. In paragraph 4 it is categorically stated that the suit premises are not being used. In paragraph 5 it is stated that "even otherwise the plaintiff is committing an illegality by using the premises for a dispensary. This statement does not run counter to what the plaintiff has said in paragraph 4 of the plaint. This does not mean that the plaintiff has admitted that the defendant is running the dispensary. Obviously what is sought to be conveyed is that being a government servant the plaintiff can not run a private dispensary. This submission of Mr. Thorat must, therefore, fail.

31. So far as non framing of issue as regards there being reasonable and just cause for not using the premises is concerned, in his written statement the defendant has not come out with such a case. The defendant's case is that he has been using the suit premises and, therefore, there was no question of framing such an issue. In any case the lower court has framed a point in that connection. The parties have led evidence and it is apparent from the evidence that the defendant has not been using the suit premises. Even otherwise there is nothing to suggest that there was any reasonable and just cause for non user.

32. So far as the intention to return to the suit premises is concerned, I do not find any evidence to that effect. Nothing has been produced by the defendant to come to a conclusion that he had any intention to return to the suit premises. The judgment in Achut's case (supra) does not help the defendant.

33. So far as Doshi's case (supra) is concerned, though in that case this court has held that total non user of the premises is one of the three

essential conditions to attract the provisions of Section 13(1)(k) of the Rent Act, ultimately the decree is passed on the ground of change of user. Even assuming that total non user would attract Section 13(1)(k) of the Rent Act, in this case there is no acceptable evidence led by the defendant to indicate that even for some period the premises were used by him for conducting dispensary.

34. It is pertinent to note that the electricity bills which were produced by the plaintiff also contain an endorsement that the premises were closed. To that the argument advanced is that the defendant conducts the dispensary in the evening and the persons of the electricity department come to collect bills in the afternoon. This submission has no foundation. No acceptable evidence is led in that behalf and hence it must be rejected.

35. Taking an overall view of the matter, I am of the opinion that the judgments of the courts below cannot be described as perverse warranting my interference in writ jurisdiction. In the circumstances writ petition is rejected. Rule is discharged.

36. In view of the dismissal of the writ petition civil application does not survive.

37. At this stage the learned counsel for the petitioner states that the petitioner is desirous of approaching the Supreme Court and hence the decree may not be executed for a period of six weeks from today. In the circumstances of the case the decree shall not be executed for six weeks.

(SMT. RANJANA DESAI,J.)